

UNITED
NATIONS

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~~15 September 2003~~ 15 September 2003

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International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of
Former Yugoslavia since 1991

Case No. IT-95-12-PT
Date: 15 September 2003
Original: English

IN THE TRIAL CHAMBER

Before: Judge Liu Daqun, Presiding
Judge Carmen Maria Argibay
Judge Volodymyr Vassilenko

Registrar: Mr. Hans Holthuis

Decision of: 15 September 2003

THE PROSECUTOR

v.

IVICA RAJIĆ

**DECISION ON JOINT DEFENCE MOTION FOR ACCESS TO CONFIDENTIAL
SUPPORTING MATERIAL, FILINGS, TRANSCRIPTS AND EXHIBITS
IN THE RAJIĆ CASE**

The Office of the Prosecutor:

Mr. Kenneth Scott

Counsel for the Defence in the Rajić case

Mr. Željko Olujić

Counsel for the Defence in the Hadžihasanović and Kubura case:

Ms. Edina Rešidović

Mr. Stéphane Bourgon

Mr. Fahrudin Ibrišimović

Mr. Rodney Dixon

Case No: IT-95-12-PT



TRIAL CHAMBER I ("the Chamber") of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("the Tribunal");

NOTING the "Joint Defence Motion for Access to Confidential Supporting Material, Filings, Transcripts and Exhibits in the *Rajić* case" filed by the Defence of Enver Hadžihasanović and Amir Kubura ("the Applicants") on 18 July 2003 ("the Motion"),

NOTING the "Prosecution's Response to Joint Motion from Hadžihasanović and Kubura for Access to Confidential Supporting Material, Transcripts and Exhibits", filed by the Office of the Prosecutor ("the Prosecution") on 31 July 2003 ("the Response"),

NOTING the "Annex to Prosecution's Response to Joint Motion from Hadžihasanović and Kubura for Access to Confidential Supporting Material, Transcripts and Exhibits", filed confidentially and *ex parte* by the Prosecution on 31 July 2003 ("the Annex"),

NOTING that the Motion seeks access to all confidential supporting material, transcripts and exhibits in the *Prosecutor v. Ivica Rajić* ("the *Rajić* case") on the grounds that (i) the Indictment in the *Rajić* case deals with geographical areas, events and offences closely related to certain of the charges in *Prosecutor v. Enver Hadžihasanović and Amir Kubura* ("the Applicants' case")¹; (ii) the disclosure of the material sought would be of considerable assistance in the preparation of the Applicants' defence²; and (iii) necessary and reasonable protective measures be imposed,

NOTING that, in the Response, the Prosecution argues that (i) the Indictments in the Applicants' case and in the *Rajić* case cover not specifically the same events, but a similar geographical area and time frame, wherefore the Prosecution does not oppose the access to confidential supporting materials filed in the *Rajić* case provided that the names, addresses, whereabouts and other identifying information of some of the potential witnesses specified in the Annex ("the witness details of the specified witnesses") be redacted³; (ii) as it is first for the Applicants to determine if

¹ The Motion, para. 3. The Applicants submit "[t]hat the alleged offences in both cases were committed during the same armed conflict between the HVO and the ABiH in the same area, with the accused in each case allegedly on opposing sides."

² The Motion, para. 6. The Applicants argue that the material could be of material assistance in the preparation of the Applicants' defence to "the charges of wanton destruction not justified by military necessity in Vareš in particular in relation to the military operations conducted, the forces involved, [...] the details of the alleged offences ... [and] the command and control structures of the opposing parties, which is central to the case against the Applicants, who are only charged under Article 7 (3)."

³ The Response, paras 6 and 7.

the material sought is of significant relevance to their defence there is no reason for a disclosure of the witness details of the specified witnesses at this stage⁴; and (iii) once the Applicants can review the redacted material the witness details "should only be disclosed if the Applicants make a significant, particularised showing of a substantial and *bona fide* basis and reason why the disclosure of this information is actually warranted"⁵,

NOTING that the Prosecution further argues that the Motion by asking for access to all confidential material in the *Rajić* case leaves open the interpretation that the Applicants seek access to future confidential material, but that access to future confidential material, transcripts and exhibits "would constitute an unwarranted and inappropriate limitation on the Trial Chamber's discretion to deal with any further matters in the future based on the circumstances existing at that time" and should not be granted without a particular showing of relevance to the Applicants' case,⁶

CONSIDERING that a party may not engage in a fishing expedition, but that, provided it does not do so, it is entitled to seek material from any source to assist in the preparation of his or her case on certain conditions being satisfied, namely: (i) if material sought has been identified or described by its general nature as clearly as possible even though it can not be described in detail; and (ii) if a legitimate forensic purpose for such access has been shown,⁷

CONSIDERING that the relevance of the material sought by a party may be determined by showing the existence of a nexus between the Applicants' case and the case from which such material is sought, i.e., where a geographical, temporal or otherwise material overlap between the cases exists the material sought is likely to be of material assistance to the [Applicants'] case or, at least, there is a good chance that it may give the [Applicants] such assistance,⁸

⁴ The Response, para. 8.

⁵ The Response, para. 7.

⁶ The Response, para. 4.

⁷ *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-AR73, Decision on Appeal from Refusal to Grant Access to Confidential Material in Another Case, 23 April 2002, p. 3; *Prosecutor v. Dario Kordić & Mario Čerkez*, Case No. IT-95-14/2-A, Decision on Motion by Hadžihasanović, Alagić, and Kubura for Access to Confidential Supporting Material, Transcripts and Exhibits in the *Kordić & Čerkez* Case, 23 January 2003, p. 3.

⁸ *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on Appellants Dario Kordić and Mario Čerkez's Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleadings and Hearing Transcripts Filed in the *Prosecutor v. Blaškić*, 16 May 2002, para. 15 referring to *Prosecutor v. Radoslav Brđanin & Momir Talić*, Case No. IT-99-36-PT, Decision on Motion by Momir Talić for Access to Confidential Documents, 31 July 2000, para. 8; *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Decision on Momčilo Gruban's Motion for Access to Material, 13 January 2003, para. 7; *Prosecutor v. Dario Kordić & Mario Čerkez*, Case No. IT-95-14/2-A, Decision on Motion by Hadžihasanović, Alagić, and Kubura for Access to Confidential Supporting Material, Transcripts and Exhibits in the *Kordić & Čerkez* Case, 23 January 2003, p. 4.

CONSIDERING that the Applicants have described the material sought by its general nature, and that in view of the geographical and temporal overlap between the Applicants' case and the *Rajić* case, the Trial Chamber finds that access to the confidential supporting material in the *Rajić* case is likely to be of material assistance to the Applicants or at least, that there is a good chance that it may provide assistance to their defence,

CONSIDERING that the Chamber finds that the Motion's request for access to all confidential material in the *Rajić* case encompasses also the request for access to future material; that this case is currently at pre-trial stage and that a request for disclosure of future material is premature and should only be made when such material actually exists to enable the Chamber to decide on the basis of the circumstances at that time,

CONSIDERING the "Order on Prosecution's Motion for Protective Measures for Victims and Witnesses and Motion to Amend Prosecution's Motion", issued by the Chamber in the *Rajić* case on 24 July 2003,

CONSIDERING that it falls within the Chamber's discretion to strike a balance between the right of a party to have access to material to prepare its case and guaranteeing the protection and the integrity of confidential information;⁹ that it thus considers that the protective measures granted in this decision are appropriate measures for the protection of the victims and witnesses and would not impact on the ability of the Applicants to prepare their case,

CONSIDERING that at this stage the Applicants do not need to know the witness details of the specified witnesses in order to determine whether the material sought will in fact assist them in the preparation of their defence¹⁰; however the Prosecution may have to disclose the witness details of the specified witnesses at a later stage if their revelation can be justified by the Applicants having considered the material,

PURSUANT TO Articles 20, 21 and 22 of the Statute and Rules 54 and 75 of the Rules of Procedure and Evidence ("the Rules"),

⁹ *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on Appellants Dario Kordić and Mario Čerkez's Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleadings and Hearing Transcripts Filed in the *Prosecutor v. Blaškić*, 16 May 2002, para. 29.

¹⁰ *Prosecutor v. Brđanin & Talić*, Case No. IT-99-36-PT, Second Decision on Motion by Radoslav Brđanin and Momir Talić for Access to Confidential Documents, 15 November 2000, para. 10.

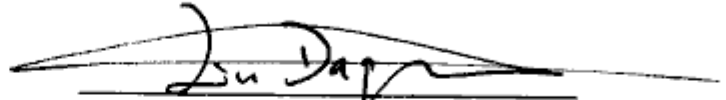
HEREBY GRANTS the Motion in part and **ORDERS** that the Registry grant access to the Applicants to the confidential supporting material in the *Rajić* case, subject to the following orders and protective measures:

1. For the purposes of this disposition:
 - (a) the "Prosecution" means the Prosecutor of the Tribunal and her staff;
 - (b) the "Applicants" means the accused *Enver Hadžihasanović and Amir Kubura*, their respective defence counsel and immediate legal assistants and staff, and others specifically assigned by the Tribunal to their defence team and identified in a list to be maintained by the lead counsel and filed with the Chamber seized of the Applicants' case *ex parte* and under seal within ten days of the entry of this order. Any and all additions and deletions to the initial list in respect of any of the above categories of persons who are necessarily identified and properly involved in the preparation of the defence shall be notified to that Chamber in similar fashion within seven days of such additions or deletions;
 - (c) the "public" means all persons, governments, organisations, entities, clients, associations and groups, other than the judges of the Tribunal and the staff of the Registry (assigned to either Chambers or the Registry), the Prosecution and the Applicants, as defined above. The "public" specifically includes, without limitation, family, friends and associates of the Applicants, the accused in other cases or proceedings before the Tribunal and defence counsel in other cases or proceedings before the Tribunal;
 - (d) the "media" means all video, audio and print media personnel, including journalists, authors, television and radio personnel, their agents and representatives;
2. Since the Prosecution is familiar with the material it shall redact it as requested; and it shall provide it to the Registry for disclosure to the Applicants;
3. Material which fall under Rule 70 of the Rules shall not be disclosed unless prior authorization is obtained by the Prosecution from the relevant authorities; the Prosecution shall be responsible for informing the Registry as appropriate;
4. The Applicants shall not disclose to the media any confidential or non-public materials provided by the Prosecution;

5. Save as is directly and specifically necessary for the preparation and presentation of their case and only on leave being first granted by the Chamber, the Applicants shall not disclose to the public, to the media or to the family members and associates of the Applicants:
 - (a) the names, identifying information or whereabouts of any witness or potential witness identified by the Prosecution, copies of witness statements, the contents thereof, or any other information which would enable them to be identified and would breach the confidentiality of the protective measures already in place, unless absolutely necessary for the preparation of the Applicants' case and always with the leave of the Chamber; or
 - (b) any evidence (including documentary, audio-visual, physical or other evidence) or any written statement of a witness or the contents, in whole or in part, of any non-public evidence, statement or prior testimony disclosed to the Applicants;
6. If the Applicants find it directly and specifically necessary to disclose such information for the preparation and presentation of their case and having obtained leave from the Chamber to do so, they shall inform each person among the public to whom non-public material or information (such as witness statements, transcripts of testimonies, exhibits, prior testimony, videos, or the contents thereof), is shown or disclosed, that he or she is forbidden to copy, reproduce or publicise such non-public material or information, and is not to show or disclose it to any other person. If provided with the original or any copy or duplicate of such material, such person shall return it to the Applicants when such material is no longer necessary for the preparation and presentation of their defence;
7. If a member of the defence teams concerned withdraws from the case, all material in his or her possession shall be returned to the lead defence counsel for the relevant defence team;
8. The Applicants shall have no contact with the witnesses concerned with the material to be disclosed, unless otherwise decided by the Chamber under the conditions set by the latter;
9. Subject to the protective measures and orders prescribed above, the protective measures that are already in place in relation to the material disclosed should remain in place.

DISMISSES the Motion in relation to the request concerning possible future confidential material in the *Rajić* case.

Done in both English and French, the English text being authoritative.



Judge Liu Daqun
Presiding Judge

Dated this fifteenth day of September 2003
At The Hague,
The Netherlands.

[Seal of the Tribunal]

